Supreme Court, U.S.
FILED
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No. _____

In The
Supreme Court of the United States

ANDREW POLICASTRO,
Petitioner,

v.

DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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April 22, 2008

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QUESTIONS PRESENTED

1. Does the First Amendment allow public school teachers to place a memo (private speech) in the teacher mailboxes?

2. Can a "plain vanilla" memo placed in the teacher mailboxes cause a "material and substantial disruption"?

3. Is a prior approval policy Constitutional (regarding teacher free speech in the teacher mailboxes) without any guidance on denial?

4. Can a pro se First Amendment lawsuit be moot for lack of damages when damages are clearly on the record but not in the original complaint?

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INTRODUCTION

My case affects 3,091,000 public school teachers in the United States.[1] As a public school teacher; the First Amendment protects my free speech (personal messages, memos, notes, cards, etc.,) in the teacher mailboxes. Teacher mailboxes are ubiquitous in public schools in the United States. U.S. mail is also placed in the teacher mailboxes. "The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra...*" *Perry Ed. Assoc. v. Perry Local Ed. Assoc.*, 460 U.S. 37, 44 (1983).

My case has been featured three times in the past three years by the National School Boards Association in their Legal Clips emails; so all the school board attorneys in the country know about this case. The *Tinker* standard is impressive as precedent, but the Third Circuit opined teacher complaints about a "plain vanilla" memo in the teacher mailboxes reach the high *Tinker* standard. Then there is no more *Tinker* standard. During the bench ruling, the District Court called the memo "plain vanilla". (Tr. 208:17).

This case involves (1) clear conflict between the Third Circuit and other circuits, (2) clear conflict between the Third Circuit and the Supreme Court of California, and (3) clear conflict between the Third Circuit and the Supreme Court. Most of all, this case defies common sense.

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[1] Digest of Education Statistics, 2006, Table 4, p. 16.

My case is about a "plain vanilla" memo placed in the teacher mailboxes. The memo, "Questions for the Tenafly Negotiation Team", was placed in the mailboxes on March 13, 2002. App. 50a, 51a. The memo was signed by 13 Tenafly High School teachers. Other teachers were offended by the content/viewpoint of the memo and complained to the principal and in turn the principal removed all the memos from the mailboxes. The memo was again placed in the teacher mailboxes and again other teachers complained to the principal and she again removed the memos and then directed the mailroom locked till the ratification vote was taken.

I have taught at three different high schools in New Jersey and in all those schools, as well as in the two cases to reach the Supreme Court of the United States concerning teacher mailboxes (*Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986)) personal messages between and among the teachers are allowed to be placed in the teacher mailboxes without administrative permission.

My case follows black letter law, specifically the *Tinker* standard. My pro se trial brief was complimented on by two Supreme Court experts (Prof. Tribe and Prof. Gressman). App. 57a-60a.

While waiting 20 months for the recent (Jan. 24, 2008) opinion, Tenafly's school superintendent, relying on the school mailbox/school email policy, suspended (for four months) my email use and use of the computers at school for replying to his email, which

asked, "So, how do we move ahead?" App. 63a-67a. I hit "reply to all" and answered his email. App. 61a-63a. I was officially reprimanded and my next step for misuse of the school mailbox/school email policy will probably be suspension or removal. App. 68a, 69a.

Seven months after this court reaffirmed that *Tinker* is still the standard for student and teacher First Amendment rights in *Morse v. Frederick,* 127 S. Ct. 2618 (2007); the Third Circuit reaffirmed that "plain vanilla" speech which offends other teachers can be removed. Censoring "plain vanilla" speech which offends other teachers "is antithetical to the First Amendment and the form of self-government that it was intended to foster." Justice Alito, dissenting, *C.H. v. Oliva*, 226 F.3d 198, 214 (3rd Cir. 2000).

OPINIONS BELOW

All four unpublished opinions (two Circuit and two District, and rehearing and en banc denial April, 2005) are in the Appendix. App. 1a-49a.

JURISDICTION

The Third Circuit rendered its decision on January 24, 2008.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

During the morning of March 13, 2002, a memo (Questions for the Tenafly Negotiation Team), signed by thirteen teachers, was placed in the teacher mailboxes by Mr. Golde, a Tenafly High School teacher, and was removed by Dr. Kontogiannis, Principal of Tenafly High School. App. 50a, 51a. The memo was again placed back in the mailboxes and was again removed under the authority of Dr. Kontogiannis. The mailroom was then locked for the rest of that school day under the authority of Dr. Kontogiannis. March 13, 2002 was ratification day for the teachers' contract. The ratification vote occurred after school in the Tenafly High School auditorium.

The teacher mailboxes at Tenafly High School are used for personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns.

Two months later, a building rep and I had a meeting with the principal concerning the removal of the memo on March 13, 2002. "You had a meeting with me and I indicated to you ...if anyone had asked me for permission, I would have said yes. There is no reason for me to have said no, that this could not have been placed in the mailbox... (Tr. 138:6).

The memo that was removed from the mailboxes on March 13, 2002 was not obscene, was not disruptive, not inappropriate, did not involve the students in any way, did not in any way carry the imprimatur of the school, and did not involve class or instructional time. The memo was quintessential speech.

A "plain vanilla memo" was signed by 13 public high school teachers who wanted to express an opinion and placed quietly and without incident in the teacher mailboxes. The memo was removed because other teachers in the building were offended by the contents of the memo and complained to the principal about the memo. "To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism of N.J., Inc. v. Stafford Twp. Sch. Dist.*, Justice Alito, 386 F.3d 514, 527 (3rd Cir. 2004). The district court's two rulings and the Third Circuit's January, 2008 ruling turned the *Tinker* standard and First Amendment jurisprudence on its head.

My rare pro se win in January, 2005 had many *Tinker* quotes and references. App. 31a-40a. The rehearing en banc denial vote included Justice Alito.[2] App. 32a. This case is *Tinker* for teachers. The *Tinker* case was mentioned eight times in the January 12, 2005 Third Circuit opinion. The *Tinker* case was never mentioned in the January 24, 2008 Third Circuit opinion.

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[2] The record does not reveal how Justice Alito (then Judge Alito) voted.

The Third Circuit opinion of January 24, 2008 spent much time and energy (about half the opinion) regarding mootness because Chief Judge Scirica stated I did not ask for damages. I clearly asked for damages. App. 53a-56a. The ten million in damages was also discussed at the August 1, 2005 settlement hearing in chambers, which was also transcribed. I never wanted any money from this lawsuit. I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1 the lawsuit would be over. App. 53a-56a.

REASONS FOR GRANTING THE WRIT QUESTIONS ONE AND TWO

According to the trial testimony about ten non-school related items were placed in each teacher's mailbox per month without administrative permission. There are approximately 100 teacher mailboxes at Tenafly. So 10 times 10 months = 100 per year per mailbox, or 800 per mailbox in the 8 years Dr. Kontogiannis has been principal. Why was this one memo removed out of the 800 non-school related items placed in each teacher's mailbox without administrative approval? One memo out of 800 in her eight years as principal?

Content and viewpoint regulation insult the core of the First Amendment.

From the trial:

> The Court: ...it wasn't the content of the memorandum or the document that created this dispute.

> Mr. Policastro: It absolutely was the content of the memo.
>
> The Court: It wasn't. She said it wasn't the content. There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum. It was the affect of the memorandum which caused her to do what she did ...

(Tr. 160:4).

("Listeners reaction to speech is not a content-neutral basis for regulation.") *Saxe v. State College*, Justice Alito writing for the court, 240 F.3d 200, 209, (3rd Cir. 2001). I believe the word "affect" should have been transcribed as "effect". (Tr. 160:11).

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, (1992). "Speech cannot . . . be punished or banned, simply because it might offend" those who hear it." *Id.* at 134-35.

"The Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener..." *Saxe* at 209. The effect of the "plain vanilla" memo does not trump the *Tinker* standard.

The District court ruled the memo was "plain vanilla" and "was not lude, vulgar, obscene or inflammatory..." (Tr. 208:17). The Third Circuit

stated, "The Memo does not contain lewd or vulgar statements." *Policastro v. Kontogiannis, et. al.*, Civ. Act. No. 04-2883, 2005 WL 1005131, at *2, slip opinion at 5, (3rd Cir.(N.J.) Jan.12, 2005, en banc rehearing denied April 12, 2005).

Incredibly, even the defendant, Dr. Kontogiannis, concurred:

> (1) "...I don't think there's anything in here that is obscene or vulgar..." (Tr. 135:23);
>
> (2) "I don't see anything in here personally that I'm offended by, but evidently other people were offended by the content of this memo." (Tr. 136:5);
>
> (3) "There's nothing in this memo that I find inappropriate." (Tr. 139:5).

So why was it removed? Because other teachers complained about the content/viewpoint of the "plain vanilla" memo.

So hundreds and hundreds of items and memos are placed in each teacher mailbox every year and this one memo is removed? The removal of the memo was unequivocally textbook content/viewpoint regulation and thus flagrantly unconstitutional. The District Court erred by ruling, "As a result, I conclude as a matter of law that there has been demonstrated by Tenafly a specific – there has been demonstrated by Tenafly that a significant disruption did occur..." (Tr. 209:4).

"You had a meeting with me and I indicated to you ...if anyone had asked me for permission, I would have said yes. There is no reason for me to have said no, that this could not have been placed in the mailbox... (Tr. 138:6).

This defies logic! The defendant stated that she would have said yes, if a teacher asked her, for permission to place the "plain vanilla" memo in the teacher mailboxes. Everybody used the mailboxes without permission. The removal of the memo was selective enforcement of an unconstitutional policy and clearly censorship.

From the January, 2006 trial:

> The Court: "There is no dispute that the teachers' mailboxes were apparently available to every teacher, every person in the school to convey materials of every conceivable description." (Tr. 23:5).

The recent Third Circuit opinion of this case conflicts with The Supreme Court in many cases including, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

"In *Tinker*, this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S., at 506." *Morse* at 2626. Chief Justice Roberts opined:

> *Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and

substantially disrupt the work and discipline of the school." *Id.*, at 513. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.*, at 514. Political speech[Policastro's memo], of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365, (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S., at 509, 510. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.*, at 508. *Morse* at 2626.

Justice Alito and Justice Kennedy concurring in *Morse* did not sparse words that *Morse* is their limit:

"I join the opinion of the Court on the understanding that...(b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue..." *Id.* at 2636. Justice Alito continued, "The Court is also correct in noting that *Tinker*, which permits the regulation of student speech that threatens a concrete and "substantial disruption," *id.*, at 514." *Id.* at 2637.

To make crystal clear, Justice Alito writes, "I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Id.*

Justice Alito opined about the limit of student[teacher] speech in public schools: "The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment." *Id.* "But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension." *Id.*

The memo caused discussion and some teachers talked in the hallways and two secretaries chatted in the library. Let's shut down the entire school and fire all those teachers who were seen talking! It is a school, sometimes teachers are allowed to talk! Maybe the students can talk too!

Justice Alito opined in *Saxe* at 212, "Noting that the only evidence was the objection of several other students, the court observed that "[I]f school officials were permitted to prohibit expression[the memo] to which other students[teachers] objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression." *Saxe v. State College*, 240 F.3d 200, (3rd Cir. 2001). This is exactly what happened on March 13, 2002 in Tenafly

High School. Teachers complained about the "vanilla" memo and the principal removed the memos. If the "plain vanilla" memo of this case can be legally removed, then teachers throughout the United States are not protected by the *Tinker* standard.

Reaction to speech is not viewpoint neutral. The memo was not disruptive, lude, or vulgar. Unusual or inappropriate reaction to a "vanilla" memo or "vanilla speech" does not give the government or a school administrator the right to censor appropriate speech. "The school's proper response is to educate the audience rather than squelch the speaker." *Hedges v. Wauconda Comm. Unit Sch. Dist.* 9 F.3d 1295, 1299 (7th Cir. 1993). "The school's proper response is to educate the audience rather than squelch the speaker. *Hedges*." *Saxe* at 214. "The police must permit the speech and control the crowd; there is no heckler's veto. *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978). Cf. *American Booksellers Ass'n v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), affirmed without opinion, 475 U.S. 1001 (1986)." *Hedges* at 1299.

> Mr. Policastro: ...A prior restraint, this prior approval is a prior restraint and these aren't the Pentagon Papers, your Honor. This is a plain memo and there wasn't a single thing wrong about what was on this memo, and anyone that reacts inappropriately to something so appropriate, that's the problem.
>
> The Court: That's your opinion.
>
> Mr. Policastro: Absolutely.

> The Court: That's your opinion and it has nothing to do with the issue in the case. (Tr. 183:16).

In fact, is this not the crux of the case? "I must also mention the incongruity of prohibiting speech because others respond to it with violence." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1195 n.5 (9th Cir. 2006) (Kozinski, J., dissenting). Teachers complained to the principal. So what! Judge Kozinski would also probably say, "So what?" "School authorities have far less latitude to ban speech that does not interfere with learning situations." *Id.* at 1194. The "vanilla" memo of this case unequivocally did "not interfere with learning situations." *Id.*

"Politics, sports, movies, music and personal matters are the ordinary subjects of discourse in high school corridors and lunch rooms." *Id.* The memo in the teacher mailboxes did not involve the classroom or the students at all. "Occasionally such discussions can become heated, but so long as they don't escalate into violence or the threat of violence, and do not otherwise interfere with school operations, they cause no disruption of the school environment." *Id.*

> *Tinker v. Des Moines Independent Community District* is the most important Supreme Court case in history protecting the constitutional rights of students [teachers]. The decision is perhaps best remembered for its stinging pronouncement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This

> sentence powerfully conveys schools are not institutions immune from constitutional scrutiny: students[teachers] retain their constitutional freedoms even when they cross the threshold into the school." Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527 (2000).

It is obvious from the trial testimony that Tenafly High School is not used to free speech among the teachers. We are isolated in different departments. I have personally gone for months without seeing other teachers because of the departmentalized structure of the school.

"The burden is on the school to prove the need for restricting student speech and the standard is a stringent one: there must be proof that the speech would "materially and substantially" disrupt the school." *Id.* at 532-533. Professor Chemerinsky's article is from the Drake Law Review, Constitutional Law Symposium, in 2000 featuring the *Tinker* case.

> Finally, and most importantly, there is a key role for the judiciary to play in protecting student[teacher] speech. School officials - like all government officials - often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech. Yet, subsequent cases rarely follow this

approach. Instead, they proclaim the need for deference to the authority and expertise of school officials. Few cases, though, involve instances where school authority must be deferred to for the sake of authority and even fewer concern expert decisions by school officials.

Justice Black's dissent in *Tinker* is an angry polemic against according students First Amendment rights. Unfortunately, his position and not that of the seven Justices in the majority seems to have triumphed. Simply put, thirty years after *Tinker*, students[teachers] do leave most of their First Amendment rights at the schoolhouse gate. *Id.* at 546.

The principal testified staff members were offended by the "vanilla memo" and she concluded that it caused a disruption. The *Tinker* standard is very high and very clear. A "vanilla memo" that offends some does not even come close to the threshold of the *Tinker* standard. "The burden is on the school to prove the need for restricting student[teacher] speech and the standard is a stringent one: there must be proof that the speech would "materially and substantially" disrupt the school." Chemerinsky at 533.

The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See *Tinker*, 393 U.S. at 509, (school may not prohibit speech based on the "mere desire to avoid the

discomfort and unpleasantness that always accompany an unpopular viewpoint"). *Saxe* at 215.

From *Saxe* on page 209, "As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989)." Justice Alito likes this quote so much he repeats the exact quote again in *Saxe* on page 215, "If there is a bedrock principle underlying the First Amendment, it is that the government[school administration] may not prohibit the expression[memo] of an idea simply because society[other teachers] finds the idea offensive or disagreeable."

It was a "plain vanilla" memo. Not one of my witnesses testified that they complained to the principal about the memo. Even if every teacher in the school complained about the memo, it would not matter. Case law clearly protects speech that others find offensive or disagree with. Again from *Saxe* at 215, 'Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." Citing *Doe v. Michigan*, 721 F.Supp. 852, 863 (1989).

The District Court was clear, "There is no dispute that the teachers' mailboxes were apparently available to every teacher, every person in the school to convey materials of every conceivable description." (Tr. 23:5)

In a case involving high school student demonstrations inside the school which did cause substantial disruption, Chief Judge Lord of the U.S. District Court for the Eastern District of Pennsylvania did not parse words. "In deciding this issue, we believe that the courts can only consider the conduct of the demonstrators and not the reaction of the audience." *Gebert v. Hoffman*, 336 F. Supp. 694, 697 (1972). Teachers complained about the "vanilla" memo and the principal of Tenafly High School censored speech by removing the memo from the teacher mailboxes. The teachers who complained were "the audience"; the teachers who signed the memo and peacefully placed it in the teacher mailboxes were the "demonstrators". It was a "vanilla" memo, it was quintessential speech. The memo was not disruptive, lude, vulgar or inflammatory. The memo should have incredible First Amendment protection.

Justice Alito seems to agree that the *Tinker* standard is high. "The precise scope of *Tinker's* "interference with the rights of others" language is unclear; at least one court has opined that it covers only independently tortuous speech like libel, slander or intentional infliction of emotional distress." *Saxe* at 217. "Therefore, if the expression of a particular religious viewpoint, such as one espousing racial hatred, creates a sufficient threat, school authorities may intervene." *C.H. v. Oliva* at 211 (3rd Circ.), Justice Alito. This is the kind of speech that reaches the high Tinker threshold; not a "vanilla" memo in the teacher mailboxes.

The "plain vanilla" memo of this case was not disruptive. Other teachers who also complained about

the memo were not disruptive. Two secretaries who were talking in the library about the memo while a student had to wait a minute to get help were also not disruptive.

Two weeks after the *Tinker* decision, Justice Fortas, who wrote the *Tinker* decision, denied cert in a First Amendment case, *Barker v. Hardway*, 394 U.S. 905, March 10, 1969. Justice Fortas wrote:

> I agree that certiorari should be denied. The petitioners were suspended from college not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension. The petitioners contend that their conduct was protected by the First Amendment, but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments. *Id.*

Justice Fortas was clear in *Tinker* and clear two weeks later; *Tinker* is about the speaker's conduct in school while expressing their First Amendment rights. *Tinker* does not protect a heckler's veto.

The memo was placed in the teacher mailboxes without disruption, noise or any interference at all with classroom instruction. Teachers who disagreed with, or were offended by the "vanilla" memo could have just thrown it out. They did not have to read it. They could have written a response to the memo and placed it in the teacher mailboxes. "As we shall discuss, the wearing[distribution] of the armbands[memo] in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Tinker* at 505.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years. *Id.* at 506.

Where do teachers have First Amendment rights in their schools? Case precedent has made it clear that teachers do not have academic freedom in their classrooms. The hallways are full of students. I would not dare interrupt a teacher during class time to pass out a memo. It is self evident that the teacher mailboxes can, and should be used by the teachers to communicate with each other. Be that with 1, 10, 20 or all 100 teacher mailboxes in Tenafly High School.

"The problem poised by the present case...does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech"." *Id.* at 507-508. The *Tinker* case and the case at bar are practically identical. Except, we did not interfere with the classroom. Our case is actually much stronger! Class instruction was not hindered at all by placing the memo in the teacher mailboxes. This case was not only selective enforcement of an unconstitutional policy and content/viewpoint discrimination by other teachers via the principal, but it was clearly censorship!

> The school officials banned and sought to punish petitioners for a silent, passive expression[memo] of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students[teachers] to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students[teachers]. *Id.* at 508.

My case fits almost perfectly into all these quotes from Tinker. "Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises". *Id.* Inappropriate reaction to speech (oral or written) does not allow the school administration to silence the speaker by removing the memos from the teacher mailboxes.

> "One must begin with the premise that government may not justify the suppression of speech because its content or mode of expression is offensive to some members of the audience. If, as Holmes observed, "every idea is an incitement," the duty of the police ordinarily must be to protect the speaker's right of expression—whatever the reaction." American Constitutional Law, Laurence Tribe, p. 852, 2nd Ed., 1988.

Dr. Kontogiannis, principal on cross-examination:

> "...[T]here were other people who found this particular memo offensive and I might add that I don't think there's anything in here that is obscene or vulgar..." (Tr. 135:22). "I don't see anything in here personally that I'm offended by, but evidently other people were offended by the content of this memo". (Tr. 136:5).

"Material and substantial disruption" comes from the "clear and present danger" threshold from previous free speech cases before *Tinker*.

> This premise emerges most clearly in the classic opinion of Justice Brandeis, joined by Justice Holmes, concurring in *Whitney v. California*: "...no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Only an emergency can justify repression". Tribe at 844.

There was no emergency at Tenafly High School on March 13, 2002, there was just a "plain vanilla" memo signed by 13 teachers which expressed an opinion. Instead of dialogue the teachers who felt threatened by the memo ran to the principal many times that morning. The trial record shows that many of the alleged complainers were, ironically, union building reps for the high school, people who were supposed to protect teacher rights and instead chose to cowardly complain about a memo that pointed out weakness in the contract to be voted upon that day. There was no emergency caused by the memo. Teachers could have just read the memo and thrown it in the garbage. They also could have written a response to the memo and placed the response in the mailboxes.

Tenafly never mentioned "substantial disruption" or "disruption" caused by the memo in their first four briefs to the federal courts. I have used the *Tinker* standard as the basis of my legal argument from the start.

"...[G]overnment will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself..." Tribe at 794.

"And if the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness." Tribe at 790. The district court erred by

concluding the memo caused a significant disruption. The memo caused discussion as it was meant to. Some students had to wait in the library because two secretaries were chatting about the memo? This is so trivial that it does not warrant any further comment. Teachers were in the hallways talking about the memo? Again, there is no evidence that those teachers were not on their free periods while conversing.

"Regulations on the speech of those who teach within the schools obviously must be drawn more narrowly than regulations on speech of outside representatives". *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053 (5th Cir. 1985), aff'd, 479 U.S. 801(1986). Teacher rights are greater than student rights.

> *Perry*, which concerns the rights of organizations outside the schools, does not apply to teacher communication within the school. See *Country Hills*, 560 F.Supp. at 1215, 1220; see also *Hastings v. Bonner*, 578 F.2d 136, 143 (5th Cir. 1978) ("[T]here is no doubt that this circuit has adopted and now applies the *Tinker* test in cases involving the First Amendment rights of teachers."). The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school". *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777

F.2d 1046, 1053 (5th Cir. 1985), *aff'd*, 479 U.S. 801 (1986).

The Tenafly teacher mailbox policy fails the *Tinker* test.

"The primary purpose of GISD's[Garland Indep. Sch. Dist.'s] internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. GISD allows teachers to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations". Id at 1055. The use of the internal mail system by the teachers in Garland allows all personal messages, memos, notes, cards, etc. to be placed in the teacher mailboxes without administrative approval. "Teachers who have access to school media facilities for even purely personal matters cannot be prohibited from the exercise of that right simply because their internal speech may concern "employee organizations"." *Id.*

"In addition, teachers use the system to send personal messages...". *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 39 (1983). "Because the contractual prohibition extends only to competing unions, PEA's letters and broadsides are not the only unofficial communications permitted to flow through the internal mail system. Teachers use the system to send purely personal messages". *Perry Local Ed. Assn. v. Holt*, 652 F.2d 1288, 1288 (7th Cir. 1981). Both teacher mailbox cases to reach the Supreme Court, *Perry* and *Texas State Teachers*, allowed personal communication between teachers in the teachers' mailboxes without approval by the administration.

The memo that was removed from the mailboxes on March 13, 2002 was not obscene, was not disruptive, not inappropriate, did not involve the students in any way, did not in any way carry the imprimatur of the school, and did not involve class or instructional time.

In 1970, in *Friedman v. Union*, 314 F.Supp. 223, a N.Y. District Court ruled that a school mailbox policy was unconstitutional and especially noted that U.S. mail was distributed in the teacher mailboxes. U.S. mail is also placed in the Tenafly teacher mailboxes, just like it is placed in all teacher mailboxes throughout the United States.

"The rights of students under the First Amendment should be afforded, as well, to teachers. *Tinker*, supra, recognized this principle when the Supreme Court said that neither 'students (n)or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' 89 S.Ct. at 736." *Friedman* at 228.

Parenthetically, it is interesting to note that the present Board policy permits any mailed item to be distributed through the faculty mailboxes. The entire Board rationale is undermined by that interpretation of 11F-21. It can hardly be argued that the fear of litter and/or disturbance is any less by the requirement that literature come into the school enclosed in an envelope or wrapper bearing a postage stamp. As to such mail the Board is not burdened with a censorship function since all such mail is placed directly in the appropriate faculty mailbox. The court has refrained from going off on this

> ground for the very reason that, even if the Board were to revise its present policy by not permitting mailed items to be placed in the faculty mailboxes, 11F-21 would still fall as an unwarranted prohibition of free speech rights which the Board may not deny to its teachers.
>
> The court finds that 11F-21 is void on its face and in its application as an overbroad prohibition of the First Amendment rights of the public school teachers in the District. *Id.*

In my trial brief and briefs before both panels in the Third Circuit (2005 and 2008), I argued the memo was also protected as a letter under the "Letter of the Carrier Exemption". 39 C.F.R. § 310.3(b)(1) states, "The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them." 39 C.F.R. § 310.1(a) defines a letter, "A letter is a message directed to a specific person or address and recorded in or on a tangible object..." In the case at bar, the memo[letter] was delivered specifically to the Tenafly High School teacher mailboxes by one of the thirteen signatories. "The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them." *Regents v. PERB*, 485 U.S. 589, 601. The memos did not have to be enclosed in an envelope to be considered mail under the Code of Federal Regulations. The letters of the carrier exemption allowed the memos to be placed in the teachers' mailboxes. The removal of the memos[letters] by, or under the authority of the principal of Tenafly High School violated 39 C.F.R. § 310.3(b)., letters of the carrier exemption of the private express statutes.

The removal of letters[memos] comes under 18 U.S.C. § 1708, "Theft or receipt of stolen mail matter generally". "Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter[memo], postal card, package, bag, or mail, or any article or thing contained therein, which has been stolen, taken, embezzled, or abstracted, as herein described, . . . taken, embezzled, or abstracted- Shall be fined under this title . . ." 18 U.S.C. § 1708 par.3. It is undisputed that the memos were removed by, or under the authority of the principal of Tenafly High School. The memos are letters under 39 C.F.R. § 310.1(a) and are protected under 39 C.F.R. § 310.3(b) and 18 U.S.C. § 1708.

During the trial, I stated:

> If I am a wealthy person and I have a memo like this and I feel like putting a 39 cent stamp and I cross it out, there is no way on earth that someone's going to remove that memo. So, thus, if I have the money, maybe we should have suggested this, but I didn't know all this, so if I place a stamp on this memo and I cross it out and I place it in those mailboxes, no one's going to remove it because now it's U.S. mail. Even though I deliver it, it's U.S. mail. That's the argument. If I want to spend – if there's 100 teachers and I have $39, I can get any memo going, so somebody else has a little extra money, they're allowed to communicate in the Tenafly mailboxes. I can get a stamp from the post office and stamp, stamp, stamp. You got your memo removed. I have $39 to spend, that communication's going in. (Tr. 181:23)

If the Supreme Court does not agree with the "Letter of the Carrier Exemption", a wealthy teacher who has the extra $41 dollars (postage has gone up, soon to be $42) can place a first class stamp on the memo, cancel the stamp with a pen, and then place the memos in the 100 mailboxes at Tenafly High School. It is incomprehensible that if a teacher expended this $41 then memos so stamped could not be removed. Free Speech is not so free!

The January, 2008 Third Circuit opinion of this case conflicts with a teacher free speech case in the Supreme Court of California from June, 1969 regarding the rights of teachers to distribute a petition in school. The California Supreme Court in *Los Angeles Teachers Union v. L.A. Board of Education*, 71 Cal. 2d. 551 (1969) ruled in favor of the teachers. From that opinion:

> The government has no valid interest in restricting or prohibiting speech or speech-related activity simply in order to avert the sort of disturbance, argument or unrest which is inevitably generated by the expression of ideas which are controversial and invite dispute. The danger justifying restriction or prohibition must be one which "rises far above public inconvenience, annoyance, or unrest." (Terminiello v. Chicago, 337 U.S. 1, 4.) This is so because the free expression of ideas concerning controversial matters is essential to our system of government. "[It] is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. . . .

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (*Id.*) As Mr. Justice Brandeis recognized, to avert violence and to preserve stable government there must be "the opportunity to discuss freely supposed grievances and proposed remedies." (Concurring opinion in *Whitney v. California*, 274 U.S. 357, 375). *L.A. Teachers* at 558.

"The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West[Tenafly] High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). Thirteen Tenafly teachers expressed an opinion about the negotiations. "That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v. California*, 274 U. S., at 372, but it is no less worthy of constitutional protection." *Id.*

Justice Stevens would surely agree that the teacher negotiations at Tenafly High School were also "unquestionably a matter of public concern, and respondents[the 13 Tenafly teachers who signed the memo] were clearly engaged in debate about that concern." *Id.*

"Tolerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required even in the schools." *L.A. Teachers* at 559.

> "[P]laintiffs have not only the right to discuss with fellow teachers issues such as those raised in the petition but also the more specific right to engage in such discussions in faculty rooms and lunchrooms during duty-free periods. Plaintiffs also have the right to "speak out freely" on such issues, which encompasses the right to communicate effectively. (Compare *Pickering v. Board of Education*, supra, 391 U.S. 563, 572) *Id.* at 560.
>
> Therefore, even if the findings be given their widest interpretation they are insufficient as a matter of law. Defendants have failed to demonstrate the existence of "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities" (*Tinker v. Des Moines Independent Community School Dist.*, supra, 393 U.S. 503, 514, italics added) as a result of plaintiffs' proposed activity. Rather, defendants have shown only that they reasonably apprehended the sort of unrest which inevitably results from the expression of controversial views but which must be tolerated in the schools as well as in society generally. In addition, they have produced speculative opinion testimony suggesting at most that plaintiffs' proposed activity may produce insubstantial and immaterial interruptions and

disturbances of teachers working in lunchrooms and faculty rooms. *Id.* at 563.

"In the present case, plaintiffs' proposed conduct clearly falls within the desirable category of political activity... Absent a showing of a clear and substantial threat to order and efficiency in the schools, such proposed First Amendment activity should not be stifled." *Id.* at 565.

From the Third Circuit opinion, January, 2005, "The memo contained five questions regarding the negotiation of the Tenafly teachers' contract." App. 36a. In sharp contrast, the Third Circuit January, 2008 panel described the memo as a "labor dispute". App. 2a. "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

"Even in a nonpublic forum, however, where the greatest restrictions are permissible, "viewpoint discrimination" is not allowed unless it passes the highest scrutiny." See, e.g., *Lamb's Chapel v. Center Moriches Union Free School Distric*t, 508 U.S. 384, 394-95." *C.H. v. Oliva*, 226 F.3d 198, 210, Justice Alito dissenting en banc (3rd Cir. 2000). Removing the memos in this case because others complained is textbook content/viewpoint discrimination. "As Justice Brennan put it in *Perry*: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry*

Education Assn., 460 U.S. at 62 (Brennan, J., dissenting)." *Id.*

"The panel's view is radically at odds with fundamental First Amendment principles. As previously discussed, viewpoint discrimination strikes at the heart of the freedom of expression. And in order to restrict core First Amendment speech, much more is needed than the possibility that the speech may cause resentment." *Id.* at 213.

The ACLU-NJ and Student Press Law Center submitted an amicus brief in support of my case to the Third Circuit in April, 2006. The ACLU-NJ also gave oral argument in January, 2007. On the brief was Jeanne LoCicero of the ACLU-NJ. The complete brief is still available online at http://www.aclu-nj.org/legal/legaldocket/policastrovkontogiannis.htm

From the ACLU-NJ and SPLC brief in support of my case: "Simply put, in the current case, the level of disruption contemplated by the *Tinker* Court to warrant a restraint of speech did not occur." Amicus at 11. Finally, somebody besides myself looked at the "plain vanilla" memo and the transcript of this case and stated what any reasonable jury would also conclude; as a matter of law the "vanilla" memo did not and could not cause a material and substantial disruption.

> *Tinker* and its progeny, however, clearly demonstrate that talking in halls and in the library does not rise to the level of disruption that justifies a deprivation of the Plaintiff's First Amendment rights. As this Circuit has

> explained the *Tinker* standard, regulation of speech "is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001). Amicus at 11.

If the memo of this case is not protected by *Tinker*, then there is no *Tinker* standard in the Third Circuit. "In the present case, the district court found less disturbance than occurred in *Tinker* and other cases in which restrictions on speech were found unconstitutional. Indeed, it found significantly less than the type of events that would rise to a substantial disturbance as a matter of law." Amicus at 15.

> The events of March 13, 2002, clearly do not amount to a substantial disruption as is required by *Tinker* and the law of this circuit. The discussions that took place in the halls and library were far less disruptive than the facts before the *Tinker* court such as the "wrecked lesson" and students who were not on task. These facts demonstrate that the memo did not create anything more than the discomfort of certain fellow teachers. Discomfort and objections, however, do not justify the suppression of speech. *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514, 528 n.9 (3d Cir. 2004) (noting that schools cannot justify the suppression of speech merely because it is "controversial.") Therefore, Defendants impermissibly removed the memo and violated

the expressional rights of Mr. Policastro. Amicus at 17.

QUESTION THREE

> A statute[school policy] may withstand an overbreadth attack "only if, as authoritatively construed..., it is not susceptible of application to speech...that is protected by the First and Fourteenth Amendments." *Goodling v. Wilson*, 405 U.S. 518, 520 (1972). If the ordinance[school policy] applies to appellant's activities[use of teacher mailboxes] and if appellant's activities[memo] are constitutionally protected, then the ordinance[school policy] is overly broad, and thus, unconstitutional". *Grayned v. City of Rockford,* 408 U.S. 104, 124 (1972).

Thus, the Tenafly mailbox policy is unconstitutional.

The teacher mailbox prior approval policy is unconstitutional. It is clearly a prior restraint on free speech. I should not have to ask permission to place a memo in the teacher mailboxes, whether I am placing items in 5, 25 or all 100 teacher mailboxes.

QUESTION FOUR

I clearly asked for damages. App. 53a-56a. The ten million in damages was also discussed at the August 1, 2005 settlement hearing in chambers, which was also transcribed. I never wanted any money from this lawsuit. I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and

Tenafly sent me a check for $1 the lawsuit would be over. App. 53a-56a.

PLAIN ERROR

The recent Third Circuit opinion stated, "One complaint reported a "commotion in the library" over the memorandum, and another reported arguments among teachers." App. 2a. The trial record revealed that the "commotion in the library" was two secretaries talking. The statement "arguments among teachers" is confusing to me. I could not find any reference to "arguments" in any briefs or anywhere in the trial record. There were no arguments at all. From the actual memo, "(5) What was the negotiating team's original proposal to the Board?" App. 51a. Arguments, because of this "plain vanilla" memo? It simply is not in the record. Neither is any "material and substantial disruption".

"I remember Leonard's [Judge Garth's] teaching about the importance of the actual record in the cases that came before him, his near reverence for the record...", 137 F.3d. LXXVI, June 25, 1997, Presentation of Portrait of Judge Leonard I. Garth, by Justice Alito.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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